Nos. 99-545, 99-642, 99-791

Supreme Court, U.S.
FILED
NOV 23 1999

IN THE

# Supreme Court of the United States

STEAMFITTERS LOCAL UNION NO. 420 WELFARE FUND, ET AL.,

*Petitioners*,

—v.—

PHILIP MORRIS, INC., ET AL.,

*Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT (99-545)

OREGON LABORERS-EMPLOYERS HEALTH & WELFARE FUND, ET AL.,

*Petitioners*,

—v.—

PHILIP MORRIS, INC., ET AL.,

*Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (99-642)

(*Caption continued on inside front cover*)

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November 23, 1999

LABORERS LOCAL 17 HEALTH AND BENEFIT FUND, ET AL.,

*Petitioners*,

—v.—

PHILIP MORRIS, INC., ET AL.,

*Respondents*.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT (99-791)

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## QUESTION PRESENTED*

Respondents submit that the following question more accurately reflects the fundamental legal defect the Courts of Appeals found in the plaintiffs' claims:

> Did the three Courts of Appeals in these cases correctly hold that the plaintiff union funds' RICO and federal antitrust claims were barred because the funds' alleged injury — payment of medical expenses to treat personal injuries suffered by their individual participants allegedly caused by smoking — was derivative of the personal injuries of the participants, and thus too remote and indirect as a matter of law to permit recovery in "direct" actions brought by the union funds?

The funds' claims also suffer from multiple additional defects which provide independent grounds for affirming the decisions of the Courts of Appeals. *See* p. 19n.*, *infra*.

The *Laborers Local* and *Oregon Laborers* Petitions also include questions concerning the availability of injunctive relief under RICO, but, as is discussed at pp. 20-22, *infra*, it is misleading for Petitioners to assert that these cases "present" these questions, and, in any event, these questions do not warrant the grant of *certiorari*.

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* In communications with the Clerk's Office, Respondents have been advised that they may submit a consolidated opposition to the Petitions for *certiorari* in *Steamfitters* v. *Philip Morris*, No. 99-545, *Oregon Laborers* v. *Philip Morris*, No. 99-642, and *Laborers Local* v. *Philip Morris*, No. 99-791. Citations herein to these Petitions are in the form "Stm. Pet.," "OL Pet.," and "LL Pet.," respectively.

## LIST OF PARTIES

**Appellees below in 99-545:**

Philip Morris Incorporated
R.J. Reynolds Tobacco Company
Brown & Williamson Tobacco Corporation
(including as successor by merger to
The American Tobacco Company, Inc.)
B.A.T Industries P.L.C.
Lorillard Tobacco Company
Liggett & Myers, Inc.
United States Tobacco Company
The Council for Tobacco Research-U.S.A., Inc.
The Tobacco Institute, Inc.
Smokeless Tobacco Council, Inc.
Hill & Knowlton, Inc.

**Appellees below in 99-642:**

Philip Morris Incorporated
R.J. Reynolds Tobacco Company
Brown & Williamson Tobacco Corporation
(including as successor by merger to
The American Tobacco Company, Inc.)
British American Tobacco (Investments) Limited
(formerly known as British-American
Tobacco Company Limited)
Lorillard Tobacco Company
Liggett Group, Inc.
United States Tobacco Company
The Council for Tobacco Research-U.S.A., Inc.
The Tobacco Institute, Inc.
Smokeless Tobacco Council, Inc.
Hill & Knowlton, Inc.

**Appellants below in 99-791:**

Philip Morris Incorporated
R.J. Reynolds Tobacco Company
Brown & Williamson Tobacco Corporation
(including as successor by merger to
The American Tobacco Company, Inc.)
Lorillard Tobacco Company
Liggett & Myers, Inc.
United States Tobacco Company
The Council for Tobacco Research–U.S.A., Inc.
The Tobacco Institute, Inc.
Smokeless Tobacco Council, Inc.
Hill & Knowlton, Inc.

## STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Philip Morris Incorporated has the following parent corporation:

Philip Morris Companies Inc.

Philip Morris Companies Inc. is the only publicly held company that owns 10% or more of Philip Morris Incorporated's stock.

Respondent R.J. Reynolds Tobacco Company has the following parent corporation:

R.J. Reynolds Tobacco Holdings, Inc. (formerly known as RJR Nabisco, Inc.)

R.J. Reynolds Tobacco Holdings, Inc. is the only publicly held company that owns 10% or more of R.J. Reynolds Tobacco Company's stock.

Respondent Brown & Williamson Tobacco Corporation (individually and as successor by merger to The American Tobacco Company) has the following parent corporations:

B.A.T Industries, p.l.c.
BATIC Inc.
BATUS Holdings Inc. UK/US
BATUS Tobacco Services, Inc.
British American Tobacco p.l.c.
British American Tobacco (1998) Limited
British-American Tobacco (Holdings) Ltd.
Louisville Securities Ltd.

British American Tobacco p.l.c. is the only publicly held company that owns 10% or more of Brown & Williamson Tobacco Corporation's stock.

Respondent British American Tobacco (Investments) Limited ("BATCo") (formerly known as British-American Tobacco Company Limited) has the following parent corporations:

British American Tobacco p.l.c.
British American Tobacco (1998) Ltd.
B.A.T Industries p.l.c.
British-American Tobacco (Holdings) Ltd.

British American Tobacco p.l.c. is the only publicly held company that owns 10% or more of BATCo's stock.

Respondent Lorillard Tobacco Company, incorrectly named in the Petitions as Lorillard Tobacco Company, Inc., has the following parent corporations:

Lorillard, Inc.
Loews Corporation

Lorillard Tobacco Company is a wholly owned subsidiary of Lorillard, Inc., which is a wholly owned subsidiary of Loews Corporation, which has outstanding securities in the hands of the public.

Respondent United States Tobacco Company has the following parent corporation:

UST Inc.

UST Inc. is the only publicly held company that owns 10% or more of United States Tobacco Company's stock.

Respondent The Council for Tobacco Research-U.S.A., Inc. ("CTR") has no parent corporations. There are no publicly held companies that own 10% or more of CTR's stock.

Respondent The Tobacco Institute, Inc. ("TI") has no parent corporations. There are no publicly held companies that own 10% or more of TI's stock.

Respondent Hill & Knowlton, Inc. has the following parent corporations:

WPP Group Holdings Corp.
WPP Group USA, Inc.
WPP International Holdings, Inc.
WPPIH Two, Inc.
WPP Luxembourg S.ARL
WPP Group plc
Ogilvy Group Inc.
J. Walter Thompson Company

WPP Group plc is the only publicly held company that owns 10% or more of Hill & Knowlton, Inc.'s stock.

Respondent Smokeless Tobacco Council, Inc. ("STC") has no parent corporations. There are no publicly held companies that own 10% or more of STC's stock.

## TABLE OF CONTENTS

PAGE

Question Presented ..... i

List of Parties ..... ii

Statement Pursuant to Supreme Court Rule 29.6 ..... iii

Table of Authorities ..... viii

JURISDICTION ..... 1

STATEMENT ..... 1

REASONS FOR DENYING THE WRIT ..... 2

POINT I THERE IS NO CONFLICT AMONG THE COURTS OF APPEALS ..... 2

POINT II THERE IS NO CONFLICT BETWEEN THE DECISIONS BELOW AND ANY DECISION OF THIS COURT ..... 4

POINT III PETITIONERS' OTHER CLAIMS OF CONFLICT ARE WITHOUT MERIT ..... 14

A. There is no conflict with the other Courts of Appeals decisions in other contexts that Petitioners rely upon ..... 14

PAGE

B. Conflicts among the district courts would not warrant the grant of *certiorari* and, in any event, the district courts have overwhelmingly rejected medical expense recovery suits by union funds and other private payors ..... 16

C. Conflicts with district court or state trial court decisions in cases brought by states or state attorneys general would not warrant the grant of *certiorari* and, in any event, there is no conflict ..... 17

POINT IV THE FUNDS' CLAIMS FOR INJUNCTIVE RELIEF UNDER RICO DO NOT WARRANT THE GRANT OF *CERTIORARI* ..... 20

CONCLUSION ..... 22

* * *

APPENDIX FEDERAL COURT OPINIONS IN SUITS BROUGHT BY UNION FUNDS AND OTHER PRIVATE PAYORS ASSERTING RICO AND/OR FEDERAL ANTITRUST CLAIMS ..... RA1

## TABLE OF AUTHORITIES

**Cases:** PAGE

*Agency for Health Care Administration* v. *Associated Industries of Florida, Inc.*, 678 So.2d 1239 (Fla. 1996), *cert. denied*, 520 U.S. 1115 (1997) ..... 18n.*

*Allgood* v. *R.J. Reynolds Tobacco Co.*, 80 F.3d 168 (5th Cir. 1996) ..... 19n.*

*Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U.S. 492 (1988) ..... 13

*American Society of Mechanical Engineers* v. *Hydrolevel Corp.*, 456 U.S. 556 (1982) ..... 13

*Anthony* v. *Slaid*, 11 Metcalf 290, 52 Mass. 290 (Mass. 1846). ..... 5

*Arkansas Blue Cross & Blue Shield* v. *Philip Morris, Inc.*, 1999 WL 1034711 (7th Cir. Nov. 15, 1999) .....3, 17n.*

*Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519 (1983) .....*passim*

*Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988)..... 13

*Beck* v. *Prupis*, 162 F.3d 1090 (11th Cir. 1998), *cert. granted*, 119 S.Ct. 2046 (1999) ..... 14

*Bennett* v. *Berg*, 685 F.2d 1053 (8th Cir. 1982)..... 21n.*

*Blue Cross & Blue Shield of New Jersey* v. *Philip Morris, Inc.*, 1999 WL 592669 (E.D.N.Y. Aug. 2, 1999); 1999 WL 1000144 (Nov. 1, 1999)..... 17n.*

PAGE

*Blue Cross & Blue Shield United of Wisconsin* v. *Marshfield Clinic*, 65 F.3d 1406 (7th Cir. 1995) .....14, 15 & n.*

*Blue Shield of Virginia* v. *McCready*, 457 U.S. 465 (1982) ..... 12

*Conkling* v. *Turner*, 18 F.3d 1285 (5th Cir. 1994) ..... 21n.*

*Dan River, Inc.* v. *Icahn*, 701 F.2d 278 (4th Cir. 1983) ..... 21

*In re EDC, Inc.*, 930 F.2d 1275 (7th Cir. 1991)..... 16

*Faircloth* v. *Finesod*, 938 F.2d 513 (4th Cir. 1991) ..... 21

*In re Fredeman Litigation*, 843 F.2d 821 (5th Cir. 1988) ..... 21

*Holmes* v. *SIPC*, 503 U.S. 258 (1992) .....*passim*

*Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977) .... 13

*International Bhd. of Teamsters, Local 734 Health & Welfare Trust Fund* v. *Philip Morris, Inc.*, 1999 WL 1034711 (7th Cir. Nov. 15, 1999).....3, 6, 14-15, 16, 17n.*

*Iowa* v. *Philip Morris, Inc.*, 577 N.W.2d 401 (Iowa 1998) ..... 18n.*

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*Kaushal* v. *State Bank of India*, 556 F.Supp. 576 (N.D.Ill. 1983).....21 & n.*

PAGE

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*Metro-North Commuter R.R. Co.* v. *Buckley*, 521 U.S. 424 (1997) ..... 19n.*

*Mid Atlantic Telecom, Inc.* v. *Long Distance Services, Inc.*, 18 F.3d 260 (4th Cir. 1994) ..... 15

*Minnesota* v. *Philip Morris, Inc.*, 551 N.W.2d 490 (Minn. 1996) ..... 18n.*

*Mobile Life Ins. Co.* v. *Brame*, 95 U.S. 754 (1877) .... 4-5

*National Organization for Women, Inc.* v. *Scheidler*, 510 U.S. 249 (1994) ..... 12

*National Asbestos Workers Medical Fund* v. *Philip Morris, Inc.*, 1999 WL 592669 (E.D.N.Y. Aug. 2, 1999); 1999 WL 1000144 (Nov. 1, 1999) ..... 17n.*

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*Rosello* v. *Brown & Williamson*, No. 97-1910 (JAF) slip op. (D.P.R. Aug. 10, 1998) ..... 17

*Roysdon* v. *R.J. Reynolds Tobacco Co.*, 849 F.2d 230 (6th Cir. 1988) ..... 19n.*

PAGE

*Sedima, S.P.R.L* v. *Imrex Co., Inc.*, 741 F.2d 482 (2d Cir. 1984), *rev'd*, 473 U.S. 479 (1985) ... 13, 21n.*

*Steamfitters Local Union No. 420 Welfare Fund* v. *Philip Morris, Inc.*, 171 F.3d 912 (3rd Cir. 1999), *r'hg and r'hg en banc denied* (Apr. 29, 1999) ..... *passim*

*Steele* v. *Hospital Corp. of America*, 36 F.3d 69 (9th Cir. 1994) ..... 15

*Texas* v. *American Tobacco Co.*, 14 F.Supp.2d 956 (E.D. Tex. 1997)..... 17

*Trane Co.* v. *O'Connor Securities*, 718 F.2d 26 (2d Cir. 1983) ..... 21

*United States* v. *Standard Oil Co. of California*, 332 U.S. 301 (1947) ..... 5

*Utah Laborers' Health & Welfare Trust Fund* v. *Philip Morris, Inc.*, No. 2:96-CV-829B, slip op. (D. Utah Mar. 30, 1999)..... 16n.*

*Wisniewski* v. *United States*, 353 U.S. 901 (1957)..... 15

**Statutes and Legislative Materials:**

15 U.S.C. § 15 ..... 19n.*

18 U.S.C. § 1964 ..... 19 & n.*, 20, 21

28 U.S.C. § 1291 ..... 1

28 U.S.C. § 1292(b)..... 1, 17n.*

42 U.S.C. § 1395y(b)(2) (Medicare Secondary Payor statute) ..... 19

42 U.S.C. § 2651 *et seq.* (Medical Care Recovery Act)..... 19

PAGE

Pub. L. No. 91-452, § 904(a), 84 Stat. 947 ..... 13n.*

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(2d ed. 1999) ..... 19n.*

## JURISDICTION

All three Petitions include precisely the same assertions concerning jurisdiction in the courts below. *See* Petitions at 1. However, the grounds for jurisdiction Petitioners asserted in the district courts were not all identical. In addition, in *Laborers Local*, the Court of Appeals took jurisdiction pursuant to 28 U.S.C. § 1292(b), not § 1291. *See* 7 F.Supp.2d 294 (certifying order); Order (2d Cir. July 14, 1998) (granting leave to appeal) (LL Pet. 54a, 58a).

## STATEMENT

In all three cases Petitioners (union health and welfare funds) are seeking "to recover money expended ... to provide medical treatment to their participants and beneficiaries who have suffered and are suffering from tobacco-related illnesses." *Laborers Local* Compl. ¶ 7 (LL Ct. App. JA41-42).* *See also Steamfitters* Compl. ¶ 7 (Stm. Ct. App. JA12) (same allegation); *Oregon Laborers* Compl. ¶ 6 (OL Ct. App. Excpt. CR120,p.5) (plaintiffs "seek to recover the tobacco-related benefit costs incurred by them"). As all three Courts of Appeals have held — unanimously — in the cases at bar, such claims by medical expense payors for recovery of money expended to treat injuries incurred by others must be dismissed as a matter of law because the injury alleged is a remote, indirect and derivative consequence of the personal injuries of the individual smokers and thus is not proximately caused by defendants' alleged acts. *See* pp. 2-3, 6-10, *infra*.

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* Citations in the form "LL Ct. App. JA__" and "Stm. Ct. App. JA__" are to the Joint Appendices submitted to the Second Circuit in *Laborers Local* and to the Third Circuit in *Steamfitters*, respectively. Citations in the form "OL Ct. App. Excpt. __" are to Plaintiffs-Appellants' Excerpts of Record submitted to the Ninth Circuit in *Oregon Laborers*. Respondents will provide the Court with copies of the materials cited (or any other part of the records below) should the Court so request.

Petitioners devote pages to allegations of defendants' wrongdoing; many of these allegations do not even appear in the complaints in the cases at bar, but are instead taken from *other* sources. These allegations — which defendants would have contested had these cases proceeded beyond Rule 12(b)(6) motions — do not in any way alter the legal bar correctly found dispositive by all three Courts of Appeals.*

## REASONS FOR DENYING THE WRIT

The decisions below are correct and do not conflict with any decisions of other Courts of Appeals, decisions of this Court, or decisions from state courts of last resort. Review by this Court is not warranted.

### I. THERE IS NO CONFLICT AMONG THE COURTS OF APPEALS.

Four Courts of Appeals have to date considered claims by plaintiff union funds against tobacco companies to recover medical expenses paid to treat personal injuries of fund participants allegedly caused by smoking. *All four* Courts of Appeals have *unanimously* and correctly held that such claims must be dismissed because the injury alleged is remote, indirect and derivative, and the complaints therefore failed to allege an injury proximately caused by defendants' alleged wrongdoing. Thus, in the three of these four cases that are the subject of the present Petitions:

- The Second Circuit unanimously held that "the economic injuries alleged in plaintiffs' complaint are purely derivative of the physical injuries suffered by plan participants and therefore too remote as a matter of law," and directed the district court to dismiss the

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* Petitioners' Statements contain many other errors, including various inaccurate characterizations of the opinions of the courts below. Erroneous assertions of law are addressed *infra*.

complaint. *Laborers Local* v. *Philip Morris*, 191 F.3d 229, 244 (LL Pet. 25a) (2d Cir. 1999), *r'hg and r'hg en banc denied* (Aug. 6, 1999). Rehearing *en banc* was denied in an order which stated that no judge "has requested that a vote be taken thereon." Order (Aug. 6, 1999).

- The Third Circuit, holding that the "necessary proximate-cause connection is missing," unanimously affirmed dismissal of the complaint. Rehearing *en banc* was denied. *Steamfitters* v. *Philip Morris*, 171 F.3d 912, 934 (Stm. Pet. 37a) (3rd Cir. 1999), *r'hg and r'hg en banc denied* (Apr. 29, 1999).

- The Ninth Circuit unanimously held that plaintiff union funds' "RICO and antitrust claims are 'too remote' from defendants' alleged wrongdoing to allow recovery" and affirmed dismissal of the complaint. No petition for rehearing or rehearing *en banc* was filed. *Oregon Laborers* v. *Philip Morris*, 185 F.3d 957, 964 (OL Pet. 9a) (9th Cir. 1999).

Most recently, the Seventh Circuit also unanimously affirmed dismissal of claims by union funds for the recovery of medical expenses and directed dismissal of similar claims by various Blue Cross entities on the grounds, *inter alia*, that "[t]he injury for which the plaintiffs seek compensation is remote indeed." *International Bhd. of Teamsters* v. *Philip Morris, Inc.*, and *Arkansas Blue Cross* v. *Philip Morris, Inc.* (joint opinion) 1999 WL 1034711 at *6 (7th Cir. Nov. 15, 1999).

The lack of a conflict among the Courts of Appeals on the question presented strongly indicates that review should be denied. This conclusion is further confirmed by the fact that, as discussed below, there is no conflict with decisions of this Court (*see* Point II, *infra*), or with decisions of Courts of Appeals in other contexts (*see* Point III.A, *infra*). Furthermore, asserted conflicts with decisions of federal district courts or state trial courts would not warrant the grant of *cer-*

*tiorari* — even apart from the fact that Petitioners misdepict the weight of the authority and the pertinence of decisions from those courts. *See* Points III.B & III.C, *infra*.*

## II. THERE IS NO CONFLICT BETWEEN THE DECISIONS BELOW AND ANY DECISION OF THIS COURT.

There is no conflict between the Courts of Appeals decisions rejecting union fund claims and decisions of this Court. To the contrary: as all four Courts of Appeals have unanimously recognized, dismissal of the funds' claims to recover medical expenses paid to treat fund participants follows inexorably from this Court's precedents barring claims for remote and indirect injuries. As this Court observed in *Holmes* v. *SIPC*, 503 U.S. 258, 266 n.10 (1992), a tortious act will often cause "ripples of harm" extending to various persons. For example, an insurance company may suffer loss when an insured is injured, or an employer may incur costs when an employee is harmed. However, long-standing principles of law bar persons who suffer indirect and derivative injuries by virtue of their contractual or other legal relationships with direct victims of wrongdoing from recovering in their *own right* from the tortfeasor; rather, a plaintiff in the position of the union funds must pursue its recovery through subrogation, standing in the shoes of the directly injured victim.

As this Court set forth in *Holmes*, the rule barring claims for remote and indirect injuries springs from that aspect of the common law doctrine of proximate cause that "demand[s]" a "direct relation between the injury asserted and the injurious conduct alleged." 503 U.S. at 268. This "requirement" of direct injury ("one of [the] central elements" of proximate causation) (*id.* at 269) is articulated in no fewer than four decisions by this Court. Thus, in 1877, in *Mobile Life Ins. Co.* v. *Brame*, 95 U.S. 754, this Court barred a life insurer's

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* A chart describing the disposition of union fund and other private payor cases in federal courts is appended to this brief. *See* RA1.

attempt to recover directly against the murderer of its insured, explaining:

> The relation between the insurance company and [the insured] was created by a contract between them, to which [the murderer] was not a party. The injury inflicted by him was upon [the insured], against his personal rights; that it happened to injure the plaintiff was an incidental circumstance, a remote and indirect result, not necessarily or legitimately resulting from the act of killing. (*Id.* at 758-59.)

This Court added that: "we are not cited to any case in this country or Great Britain where a different doctrine has been held." *Id.* at 759. Thereafter, in *United States* v. *Standard Oil*, 332 U.S. 301, 311-16 (1947), this Court held that the Government did not have a direct right of action under the common law to recover from a tortfeasor medical expenses incurred by the Government as a result of tortious injury to a soldier. This Court made clear that no such cause of action existed, and declined to create one.

The settled common law bar to recovery for remote injuries has been expressly applied and incorporated by this Court into the antitrust laws, *Associated General Contractors* v. *California State Council*, 459 U.S. 519, 531-33 (1983) ("*AGC*"), and RICO, *Holmes*, 503 U.S. at 268-71. In *AGC*, the Court held that Congress intended common law principles of proximate causation, directness of injury, and certainty of damages to apply to antitrust damages litigation. *See* 459 U.S. at 532-333. This Court in *AGC* illustrated the rule barring remote and indirect claims with an example drawn from the facts of the seminal case of *Anthony* v. *Slaid*, 52 Mass. 290 (Mass. 1846). *See* 459 U.S. at 532 n.25. Anthony, who had contracted to support a town's poor, sued for his increased medical expenditures after defendant's wife assaulted a pauper. The Massachusetts Supreme Judicial Court unanimously denied recovery, concluding that the injury to Anthony —

notwithstanding the intentional nature of the tort — was "too remote and indirect." 52 Mass. at 291.

Thereafter, in 1992, in *Holmes*, this Court held that RICO likewise adopted the common law "demand" for a "direct relation between the injury asserted and the injurious conduct alleged." 503 U.S. at 268. The Court held that SIPC — which stood in the shoes of customers of two different broker-dealers — was not entitled to pursue RICO claims against an insider whose stock manipulation had caused the failure of the broker-dealer, which had in turn caused the customers' loss. While the manipulation caused cognizable harm to the *broker-dealer*, this Court held "the link is too remote between the stock manipulation alleged and the *customers*' harm." *Id.* at 271 (emphasis added).

The injury alleged by the Petitioner funds — payment of medical expenses to treat personal injuries suffered by fund participants allegedly injured by smoking (*see* p. 1, *supra*) — falls squarely within a category of injuries which for over 150 years has been held to be remote, indirect and derivative. Under long-settled law, any such claim must be asserted, if at all, by way of subrogation, whereby the third-party payor "steps into the shoes" of the injured individual and is subject to whatever defenses may be asserted against that individual. *See, e.g., Laborers Local*, 191 F.3d at 233 (LL Pet. 4a); *International Bhd. of Teamsters*, 1999 WL 1034711 at *3 (7th Cir. Nov. 15, 1999) ("insurers or other third-party providers of assistance and medical care ... may recover only to the extent their contracts subrogate them to the victim's rights.").

Petitioners claim that their injuries came about through "two separate causal chains." The first "causal chain" supposes that defendants directed their alleged wrongful acts at the *funds* themselves, thus supposedly preventing the funds from taking steps to reduce their medical costs by, for example, discouraging smoking by their members. The second "causal chain" supposes that defendants "withheld accurate information and safer cigarettes *from smokers*," thus resulting

in increased costs to the funds from their participants' smoking-related illnesses. Stm. Pet. 9 (emphasis added); *see also Oregon Laborers*, 185 F.3d at 962 (OL Pet. 4a); *Laborers Local*, 191 F.3d at 239 (LL Pet. 16a).

Nevertheless, under each of these theories, the injury to the funds only occurred because fund participants smoked, became ill, and incurred medical costs which the funds paid pursuant to their plan contracts. Thus, as the Second, Third and Ninth Circuit decisions at bar have all recognized, on *each* of the funds' "causal chains," injury to the funds is an indirect and remote consequence of fund participants' personal injuries. *See Laborers Local*, 191 F.3d at 239 (LL Pet. 16a) (funds' "damages are entirely derivative of the harm suffered by plan participants as a result of using tobacco products"); *Steamfitters*, 171 F.3d at 927 (Stm. Pet. 24a) (injury to funds came about through injury to smokers); *Oregon Laborers*, 185 F.3d at 963 (OL Pet. 8a) ("all of plaintiffs' claims rely on alleged injury to smokers"). In concluding that the funds' alleged injury was too remote and indirect as a matter of law, the Second, Third and Ninth Circuit decisions at bar — far from "creat[ing] a new requirement for 'direct' injury," as Petitioners argue (LL Pet. 4; Stm. Pet. 4; OL Pet. 4) — properly applied *AGC*, *Holmes* and this Court's other precedents to the particular factual framework in these cases.*

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* Petitioners argue to this Court (as they did to all the Courts of Appeals) that their first theory — which they label the "one-link causal chain" — does not suffer from any problem of remoteness because, under this theory, the funds "were *directly* lied to, defrauded, and deprived of the benefits of new and safer tobacco products. The effect of defendants' misconduct on [Petitioners] was not mediated through any effect on a third party." LL Pet. 19; Stm. Pet. 19; OL. Pet. 18. But Petitioners are simply wrong, for the proximate cause/indirectness analysis looks at the relation between the *injury* alleged and defendants' misconduct. *See, e.g., Holmes*, 503 U.S. at 268 ("demand for some direct relation between the *injury asserted* and the injurious conduct alleged") (emphasis added); *AGC*, 459 U.S. at 535 (court must evaluate "the relationship between" "the plaintiff's *harm*" and "alleged wrongdoing") (emphasis added). As noted in the text, the Courts of Appeals are in agreement that the funds'

Indeed, the injury alleged by Petitioners is *even more* remote and indirect than the injuries held *not* actionable in *AGC* and *Holmes*. In those cases, plaintiffs' injuries were impermissibly remote and indirect, but plaintiffs at least were deemed to be asserting an injury *separate* from that of the directly injured party. Not so here. Here, the funds' injuries all derive from the fact that the funds were called upon to pay the medical expenses *of* their directly injured participants. As the Second Circuit recognized in *Laborers Local*, the funds' injury, *however characterized*, is "entirely derivative of the harm suffered by plan participants as a result of using tobacco products." *Laborers Local*, 191 F.3d at 239 (LL Pet. 16a).

Petitioners argue that the Second, Third and Ninth Circuits erroneously applied the requirement of direct injury in a "formalistic" way and downplayed a multi-factor remoteness analysis, which, Petitioners assert, must be applied anew on an *ad hoc* basis in each case. LL Pet. 14-23; Stm. Pet. 13-24; OL Pet. 12-21. But, to the contrary: all three Courts of Appeals explicitly analyzed and assessed the *AGC/Holmes* "factors" in light of the funds' allegations, and concluded that these factors *supported* dismissal. *See Laborers Local*, 191 F.3d at 239-41 (LL. Pet. 17a-20a); *Oregon Laborers*, 185 F.3d at 963-66 (OL Pet. 8a-14a); *Steamfitters*, 171 F.3d at 923-34 (Stm. Pet. 16a-37a). Given that all three Courts of Appeals *did* analyze these policy considerations in concluding that dismissal was required, these cases simply do not provide an opportunity to address the question whether such analysis was in fact required. Thus:

- All three Courts of Appeals stressed the difficulty inherent in "ascertain[ing] the amount of [the funds'] damages attributable to the violation, as distinct from other, independent factors." *Holmes*, 503 U.S. at 269. *See Laborers Local*, 191 F.3d at 239-40 (LL Pet. 17a-18a) ("incredibly speculative . . . virtually impossible

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alleged *injury* is derivative of smokers' personal injuries on *both* of the funds' causal theories.

. . . to prove with any certainty"; requires "sheerest sort of speculation"); *Steamfitters*, 171 F.3d at 930, 933 (Stm. Pet. 29a, 35a) ("highly speculative and complex"; "tortured path . . . to the Funds' increased expenditures"; "this causation chain is much too speculative and attenuated"); *Oregon Laborers*, 185 F.3d at 965 (OL Pet. 13a) (speculativeness of claims "weigh[s] heavily, if not dispositively, in favor of barring plaintiffs' actions").

- The concern that "recognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries" (*Holmes*, 503 U.S. at 269) likewise supports dismissal here, as all three Courts of Appeals recognized. *See Laborers Local*, 191 F.3d at 240-41 (LL Pet. 18a-19a); *Steamfitters*, 171 F.3d at 933 (Stm. Pet. 35a-36a); *Oregon Laborers*, 185 F.3d at 965-66 (OL Pet. 14a).

- The Second and Ninth Circuits correctly recognized that lawsuits by smokers (or by the funds in subrogation of individual smokers) were available to remedy losses arising from any personal injuries inflicted on smokers, thus satisfying "the general interest in deterring injurious conduct" (*Holmes*, 503 U.S. at 269):

  > "The Funds may still bring a subrogation action to recover the medical costs paid out for the individual smokers, and the smokers themselves have sufficient independent incentive to pursue their own causes of action for such additional types of injuries as pain and suffering. Although these will not be RICO claims, they will remedy the harm done by defendants' alleged misconduct." *Laborers Local*, 191 F.3d at 241 (LL. Pet. 20a).

> "The existence of the smokers, who are more direct victims of the alleged wrongful conduct and who can be counted on to vindicate the injury caused by defendants' alleged wrongful conduct, weighs heavily in favor of barring plaintiffs' actions." *Oregon Laborers*, 185 F.3d at 964 (OL Pet. 10a-11a).*

Petitioners also argue that the Courts of Appeals erred by failing to recognize that "[t]he purpose of these factors is to

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* Petitioners claim that review by this Court is required because of supposed "conflicts" in the *AGC/Holmes* policy factor analysis that each Court of Appeals concluded required dismissal of Petitioners' claims. *See* LL Pet. 11; OL Pet. 9-10. But, as the text accompanying this footnote shows, any differences between the Courts' analyses are greatly outweighed by the agreements and, in any event, the ultimate result in each case was the same. Any such differences in analysis as may exist fall far short of "conflicts" requiring this Court's review.

In addition, it is respectfully submitted that *AGC* and *Holmes* do not require that the "factors" discussed therein — which *Holmes* described as "*reasons*" for the "directness of relationship" "*requirement*" (503 U.S. at 269 (emphasis added)) — be applied anew in every case, even in categories of cases in which the principles of proximate causation are long-settled, as they are here. *See* pp. 4-6, *supra*. Although, as this Court observed in *AGC*, 459 U.S. at 536, and in *Holmes*, 503 U.S. at 272, n.20, a black-letter rule cannot be announced that would dictate the result of "*every* case," that does *not* mean that *no* black-letter rule can ever be articulated that would require dismissal in *any* case. For example, it is uniformly settled that a corporate shareholder may not bring a "direct" claim to recover for diminution to the value of his shares occasioned by injury to the corporation. Thus, there is no need in each attempted "direct" suit by a shareholder to engage in a case-by-case analysis of the policy factors; rather, it is well-settled that the shareholder's only recourse lies in bringing a derivative suit on behalf of the corporation. Nor should there be any need to engage in an *ad hoc* review of the policy factors here where another well-settled rule likewise applies to require dismissal, to wit, "plaintiffs who are obligated to pay the medical expenses of another may not recover against the tortfeasor who caused the damage." *Laborers Local*, 191 F.3d at 237 (LL Pet. 12a). However, as noted in the text, given that here all three Courts of Appeals *did* in fact analyze the policy "factors" in concluding that dismissal was required, it makes no difference here whether such an analysis was in fact "required."

identify which of several possible plaintiffs will be given standing to sue for a RICO [or antitrust] violation." LL Pet. 14; Stm. Pet. 13; OL Pet. 13. In other words, Petitioners argue that *some* plaintiff must always be given standing to bring a federal treble damages suit under RICO or the antitrust laws for every injury, *no matter how remote, indirect, and derivative that injury is*. But Petitioners' "best plaintiff" theory is unfounded, and was unanimously (and properly) rejected. *AGC* specifically observed that "there is a point beyond which [a] wrongdoer *should not be held liable*" for the "ripples of harm" flowing from a violation of the antitrust laws, and explicitly rejected any contention that there must always be a plaintiff with standing to bring a federal statutory treble damages suit for every injury: "Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." 459 U.S. at 534 (emphasis added). To like effect, *Holmes* explains that the doctrine of proximate cause is a "judicial tool[ ] used to *limit* a person's responsibility for the consequences of that person's own acts." 503 U.S. at 268 (emphasis added). Moreover, as noted above, individual smokers can bring suit to remedy any personal injuries suffered (and the funds, standing in the shoes of their participants, may pursue subrogation claims to recover medical expenses paid to treat particular individual smokers) — albeit (as all parties agree) such claims would not be federal RICO or antitrust claims because such personal injury claims would not satisfy the injury to "business or property" requirement for suit under those statutes.*

Indeed, Petitioners' "best plaintiff" theory turns Congressional intent on its head. The inability of those directly injured (*i.e.*, individual smokers) to sue under RICO or the

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* *See, e.g.*, Stm. Pet. 2, 20 ("Smokers cannot bring RICO and antitrust claims because they ... cannot satisfy the 'business or property' requirement"); LL Pet. 3 (funds are "*only plaintiffs ... legally able to assert these RICO claims*") (emphasis in original), 19-20; OL Pet. 3, 18.

antitrust laws for their medical expenses because personal injuries are not injuries to "business or property" is hardly a point *in favor* of allowing *the funds* to sue under these federal statutes for those same injuries. This would flout Congress' policy determination *not* to permit recovery of personal injury damages, including medical expenses, in RICO or antitrust treble damage actions — no matter by whom asserted. *See Laborers Local*, 191 F.3d at 241 (LL Pet. 20a) ("the lack of a RICO damages remedy for even direct personal injuries ... actually weighs heavily *against* RICO standing for parties (such as the Funds) alleging harms that are purely contingent on personal injuries suffered by others") (emphasis added); *Oregon Laborers*, 185 F.3d at 964 (OL Pet. 9a-11a).

Petitioners' argument that there is a conflict between the three Courts of Appeals decisions from which they seek *certiorari* and certain other decisions of this Court (LL Pet. 4, 16-17; Stm. Pet. 4, 15-16; OL Pet. 4, 14-15) is also manifestly without merit. None of the cases Petitioners cite held that a plaintiff can sue under RICO or the antitrust laws for injuries arising as a consequence of prior injuries to another (to say nothing of indirect injuries resulting from treating or compensating the first-injured person for his injury). Thus:

- In *Blue Shield* v. *McCready*, 457 U.S. 465 (1982), the plaintiff was *directly* injured as a participant (buyer) in the market for psychotherapy services. *See AGC*, 459 U.S. at 540 n.44; *see also Steamfitters*, 171 F.3d at 926; *Oregon Laborers*, 185 F.3d at 967.

- In *NOW* v. *Scheidler*, 510 U.S. 249 (1994), the only issue on which *certiorari* was granted was whether an economic motive was required for a RICO claim (*id.* at 252), and the only standing issue addressed by this Court was the "threshold" issue whether plaintiffs had *jurisdictional* or *Article III* standing – which requires only injury-in-fact and not the proximate cause requirement of "direct injury" that bars plaintiffs' claims here (*id.* at 255-56).

- *Allied Tube* v. *Indian Head*, 486 U.S. 492 (1988) (which limited *certiorari* to an issue of Noerr-Pennington immunity, *id.* at 499 n. 3), and *American Soc'y Mech. Eng'rs* v. *Hydrolevel*, 456 U.S. 556 (1982), concern injuries to competitors caused by influencing standard-setting bodies to promulgate certain standards and issue interpretations of such standards; in neither case did the Court address any issue of direct injury/proximate cause.

- *Illinois Brick* v. *Illinois*, 431 U.S. 720 (1977), simply recognizes a narrow exception to the separate "direct purchaser rule" of the antitrust laws for cost-plus contracts.

- *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988), which upheld a presumption of reliance on public misrepresentations in Rule 10b-5 actions, did not concern RICO *or* the antitrust laws *or* the issue of proximate causation.

- Although this Court in *Sedima* v. *Imrex*, 473 U.S. 479, 497 (1985), noted generally that "RICO is to be read broadly," the case did *not* involve any issue of standing to pursue RICO claims for remote and indirect injuries. And *thereafter* in *Holmes*, this Court squarely held that Congress intended to require direct injury in RICO actions. 503 U.S. at 265-68. As this Court stated, "[a]llowing suits by those injured only indirectly" would actually " '*undermine*[ ] the effectiveness of treble-damage suits.' " *Holmes*, 503 U.S. at 274 (emphasis added), *quoting AGC*, 459 U.S. at 545.*

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* The funds, quoting Pub. L. No. 91-452, § 904(a), 84 Stat. 947, argue that RICO "shall be liberally construed to effectuate its remedial purposes." LL Pet. 12; Stm. Pet. 11; OL Pet. 10. But this does *not* mean that there is standing under RICO to assert claims for remote and indirect injuries, as the Court made clear in *Holmes* in rejecting the identical argument that § 904(a) required a finding that SIPC had standing. *See* 503 U.S. at 274.

For all these reasons, the decisions of the Courts of Appeals faithfully apply settled principles set forth in this Court's cases. Review therefore should be denied.

Finally, Petitioners' assertion that *Beck* v. *Prupis*, No. 98-1480, *cert. granted*, 119 S.Ct. 2046 (1999), *argued* Nov. 3, 1999, raises a "related" question concerning "the proper interpretation of the [*Holmes*] proximate cause factors" (OL Pet. 2; LL Pet. 2) is without merit. The issue in *Beck*, as stated by the Eleventh Circuit, was whether "a plaintiff bringing a civil RICO conspiracy claim [must] prove that the overt act (in furtherance of the conspiracy) by which he was injured was an 'act of racketeering.' " 162 F.3d 1090, 1093 (11th Cir. 1998). This was also the "Question Presented" in Petitioner Beck's brief to this Court. *See* 1999 WL 543861 at *i. This is a different issue from that presented by Petitioners here.

## III. PETITIONERS' OTHER CLAIMS OF CONFLICT ARE WITHOUT MERIT.

### A. There is no conflict with the other Courts of Appeals decisions in other contexts that Petitioners rely upon.

As noted, there is unanimous agreement between the Courts of Appeals to have addressed Petitioners' claims and no conflict with decisions of this Court. The Courts of Appeals decisions in other contexts relied on by Petitioners (*see* LL Pet. 17-19; Stm. Pet. 16-19; OL Pet. 15-18) do not remotely create a conflict, much less a conflict warranting review by this Court:

- *Blue Cross* v. *Marshfield Clinic*, 65 F.3d 1406 (7th Cir. 1995), involving an antitrust claim by a Blue Cross payor who was overcharged by a seller of medical services (the clinic), is "inapposite," as the Seventh Circuit itself made plain in its recent decision in *Inter-*

*national Bhd. of Teamsters* v. *Philip Morris*. *See* 1999 WL 1034711 at *7 (7th Cir. Nov. 15, 1999).*

- *Steele* v. *Hospital Corp.*, 36 F.3d 69, 71 (9th Cir. 1994), held that patients could *not* sue under RICO based on overcharges to their insurance company because the patients had suffered no financial loss. The *Oregon Laborers* funds argued to the Ninth Circuit that *Steele* supported their position (*see* Plaintiffs-Appellants' Mar. 1, 1999 Br. at 27), but the Ninth Circuit obviously did not agree. But, even assuming *arguendo* that an overcharged insurance company would have had a RICO claim against an overcharging seller of medical services (which was *not* at issue in *Steele*), that scenario is not germane here (for the same reason that *Marshfield* is "inapposite"). In any event, even if (contrary to fact) one hypothesized conflicts *within* the Ninth Circuit, such conflicts would not warrant grant of *certiorari*. *See Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).
- *Mid Atlantic Telecom* v. *Long Distance Servs.*, 18 F.3d 260 (4th Cir. 1994), which involved a RICO claim alleging that a competitor's fraudulently low rates forced plaintiff to lower its own rates and caused loss of customers, is likewise irrelevant. The Fourth Circuit observed that "Mid Atlantic's injuries, as alleged, *are not derivative of any losses suffered by its former cus-*

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* Petitioners argue that the decisions of the four Courts of Appeals rejecting cl[illegible]ns by payors of the medical expenses of others to treat injuries inflicted upon such others by a tortfeasor mean that "fraudulent overbilling or anticompetitive price-fixing by a cancer medicine supplier would not be actionable by the payor." LL Pet. 13; Stm. Pet. 12-13; OL Pet. 12. But Petitioners are wrong and their hypothetical is not to the point: in the hypothetical (as in *Marshfield*) there may be a direct injury resulting from the wrongful acts of the medical supplier; however, the hypothesized suit is not against a tortfeasor alleged to have caused the injury to the patient requiring that he be treated by the "cancer medicine."

*tomers*. Rather, it claims *distinct and independent injuries*." *Id.* at 264 (emphasis added).

- Finally, Petitioners' footnote citations (LL Pet. 18 n.5; Stm. Pet. 17 n.7; OL Pet. 16 n.4) include: Third Circuit cases which *Steamfitters* explicitly ruled were not on point (*see* 171 F.3d at 923, 931-32 (Stm. Pet. 15a-16a, 30a-32a)); Second Circuit cases which *Laborers Local* addressed and explicitly concluded were examples of *direct* injury (*see* 191 F.3d at 237-39 (LL Pet. 13a-15a)); and a Seventh Circuit case (*In re EDC, Inc.*, 930 F.2d 1275 (7th Cir. 1991) which that Court pointed out in *International Bhd. of Teamsters* is "inapposite" (1999 WL 1034711 at *7). The other cases in Petitioners' footnote are not on point and, in any event, are all from Circuits in which appeals of dismissals of substantially identical union fund cases are now pending (*i.e.*, in the Fifth, Eighth, Ninth, Tenth and Eleventh Circuits).

**B. Conflicts among the district courts would not warrant the grant of *certiorari* and, in any event, the district courts have overwhelmingly rejected medical expense recovery suits by union funds and other private payors.**

Even if one hypothesized a split among the federal *district* courts in these cases, such a split would not warrant exercise of this Court's *certiorari* jurisdiction. But, in any event, Petitioners misrepresent the weight of the authority in union fund and other private payor cases in federal district courts. *See* LL Pet. 25-27; Stm. Pet. 26-29; OL Pet. 22-25. The federal district courts have overwhelmingly rejected these suits. To date, 16 federal district courts have dismissed the RICO and federal antitrust claims in such suits as a matter of law. *See* RA2-4, *infra*. In addition, in other federal district courts RICO and federal antitrust claims have been voluntarily dismissed by plaintiffs. *See* RA4-5, *infra*. By contrast, of those federal district courts that thus far have decided motions to dismiss,

RICO and federal antitrust claims survive today in only two. *See* RA5-6, *infra*.*

### C. Conflicts with district court or state trial court decisions in cases brought by states or state attorneys general would not warrant the grant of *certiorari* and, in any event, there is no conflict.

Petitioners' repeated reliance on cases brought by states or state attorneys general is misplaced. Only *two* of the decided cases brought by states or state attorneys general against the tobacco companies — the Texas and Puerto Rico suits (*Texas* v. *American Tobacco Co.*, 14 F.Supp.2d 956 (E.D. Tex. 1997); *Rosello* v. *Brown & Williamson*, No. 97-1910 (JAF), slip op. (D.P.R. Aug. 10, 1998)) — asserted federal RICO or antitrust claims. Both courts relied on the state's invocation of so-called "quasi-sovereign" or *parens patriae* authority in allowing these cases to continue, decisions with which Respondents disagree but concepts which obviously are not applicable in suits by union funds. *See Laborers Local*, 191 F.3d at 244 (LL Pet. 25a); *Steamfitters*, 171 F.3d at 934 n.18 (Stm. Pet. 37a). In addition, the court in the Texas suit dismissed the state's federal antitrust claims and essentially deferred ruling upon the sufficiency of the federal RICO claim. *Texas*, 14 F. Supp.2d

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* Of these two district courts, one (in Utah) certified its order for appeal under § 1292(b); on November 22, 1999, the Tenth Circuit granted leave to appeal. Only one federal judge, Judge Weinstein in the Eastern District of New York, has both refused to dismiss the cases before him (*National Asbestos* and *New Jersey Blue Cross*) and refused to certify. *See* RA6, *infra*. As the Seventh Circuit observed in *International Bhd of Teamsters*, Judge Weinstein's denial of defendants' motions to dismiss "is a thinly disguised refusal to accept and follow the second circuit's holding [in *Laborers Local*]." 1999 WL 1034711 at *8. As to two other cases Petitioners rely upon, in *Arkansas Blue Cross* the Seventh Circuit has now reversed and instructed the district court to dismiss the case (*id.* at *9), and although the court in *Iron Workers* denied 12(b)(6) dismissal of federal RICO and antitrust claims, it subsequently dismissed the antitrust claim on summary judgment and granted a directed verdict on the RICO claim. *See* RA1, 3, *infra*.

at 969-70. The other decisions in state cases cited by Petitioners — all of which were brought in the plaintiff states' own courts — alleged *only* state law claims and are almost entirely decisions of state *trial* courts.* Thus the cases brought by the states cannot support the grant of *certiorari* to review the dismissal by the Courts of Appeals of the union funds' RICO and federal antitrust claims.

Nor is the settlement of the state cases relevant. As the Second Circuit observed (describing decisions of other courts in cases brought by states and state attorneys general): "in general, state cases are often distinguishable on the issue of proximate causation given the state's unique role relative to protection of its citizens, statutes governing Medicaid recoupment, and certain state statutes that permit states to maintain actions on behalf of their citizenry." *Laborers Local*, 191 F.3d at 244 (LL Pet. 25a). *See also Steamfitters*, 171 F.3d at 934 n.18 (Stm. Pet. 37a).

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* The first state action filed in state court was brought in 1994 by the Mississippi Attorney General in a chancery court in Pascagoula, Mississippi. Texas filed its suit in the Texarkana Division of the Eastern District of Texas federal court, where only one judge sat.

Although Petitioners fail to mention it, in all three cases in which the issue reached a state's *highest* court, each state Supreme Court ruled that medical expense payors do *not* have an independent direct cause of action at common law, but can only proceed (if at all) through subrogation. *See Iowa* v. *Philip Morris, Inc.*, 577 N.W.2d 401, 407 (Iowa 1998); *Agency for Health Care* v. *Associated Indus.*, 678 So.2d 1239, 1248 (Fla. 1996) (holding that state did not possess independent cause of action prior to 1994 anti-tobacco statute), *cert. denied*, 520 U.S. 1115 (1997); *Minnesota* v. *Philip Morris*, 551 N.W.2d 490, 495 (Minn. 1996) (dismissing Blue Cross' special duty claim as "simply too remote"; allowing certain state statutory claims to survive because specific state statutes involved assertedly overcame remoteness bar). Thus, the three highest state courts to reach these issues — like the four federal Courts of Appeals — recognized that "direct" claims by medical expense payors are barred under traditional common law principles (which, as noted, this Court has applied to private actions under the federal antitrust laws and RICO, *see* pp.5-6, *supra*).

Similarly, the mere *filing* of suit by the United States against the tobacco companies (*see* LL Pet. 4-5; Stm. Pet. 4; OL Pet. 4) cannot possibly justify *certiorari*. That lawsuit has not yet produced a district court decision evaluating its legal merit, much less appellate review of such a decision. Moreover, two of the three claims asserted (under the Medical Care Recovery Act and the Medicare Secondary Payer statute) were not asserted in these union fund cases, and the RICO claim is brought pursuant to 18 U.S.C. § 1964(a) and (b) and seeks only equitable relief whereas the focal point of Petitioners' suits was treble damages pursuant to § 1964(c). *See* p. 20, *infra*.*

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* Review of the Courts of Appeals decisions at bar is also unwarranted because there are *multiple* grounds for affirming the decisions, and review would not lead to reversal. *First*, Petitioners' RICO and antitrust claims are also barred because medical expenses occasioned by personal injuries are not injury to "business or property." 15 U.S.C. § 15; 18 U.S.C. §1964(c); *see also Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979). The medical expenses the funds seek here are an integral component of their participants' personal injury claims (*see, e.g., Metro-North* v. *Buckley*, 521 U.S. 424, 438-39 (1997); 2 Dobbs, *Law of Remedies* §§ 8.1(1), (3) (2d ed. 1999)), and accordingly are not "business or property" injury. *See Laborers Local*, 191 F.3d at 241 (LL Pet. 19a-20a); *Oregon Laborers*, 185 F.3d at 964 and 968 (OL Pet. 9a-10a, 19a). To permit the funds to characterize medical expenses for personal injuries allegedly inflicted upon others as "business or property" injury to themselves would sanction a form of legal alchemy which would permit the existence of insurance to transform state-law claims for personal injuries into federal antitrust and RICO treble damages claims. There is no basis for such a result.

*Second*, Petitioners were not participants in a market that defendants are alleged to have restrained and thus did not suffer antitrust injury. *See Oregon Laborers*, 185 F.3d at 966-67 (OL Pet. 16a-18a). *Third*, there are procedural deficiencies in the record below that make these cases unattractive vehicles for the presentation of plaintiffs' position. Specifically, the funds' conclusory allegations of reliance lack the required particularity. In addition, as a matter of law, the funds *cannot* plead *justifiable* reliance because a plaintiff who is on *notice* of facts that should arouse suspicion must make a reasonable investigation to ascertain the truth. Court after court has recognized that the health risks asso-

## IV. THE FUNDS' CLAIMS FOR INJUNCTIVE RELIEF UNDER RICO DO NOT WARRANT THE GRANT OF *CERTIORARI*.

The *Oregon Laborers* Petitioners state that *certiorari* is needed to decide whether injunctive relief is available to a private RICO plaintiff (OL Pet. 25), and the *Laborers Local* Petitioners ask the Court to decide whether the *Holmes* "factors" apply to their RICO claim for injunctive relief (LL Pet. 27; *see also* Stm. Pet. 24 n.10 (referencing same issue)). But Petitioners' suggestions that these cases present issues concerning injunctive relief under RICO are misleading, and review by this Court of any such issue is plainly unwarranted here.

*First*, the procedural history of these cases makes them poor vehicles for addressing questions of injunctive relief under RICO. Thus, the issue of injunctive relief in these cases is a clear afterthought to Petitioners' claims for RICO treble damages. The funds' Courts of Appeals briefs barely mentioned RICO injunctive relief: the *Oregon Laborers* Petitioners' Ninth Circuit briefs devoted barely one page (out of 90) to the issue, and the *Laborers Local* Petitioners' Second Circuit brief did not address it at all (their Petition for Rehearing devoted only a half page to the issue). Moreover, the *Oregon Laborers* Petitioners appear to argue (at least in part) that injunctive relief under § 1964(a) is available to those private litigants who have standing to sue for damages under § 1964(c). *See* OL Pet. 27. But § 1964(c) requires a plaintiff to show injury to its "business or property" — which Petitioners cannot do. *See* p. 19n.*, *supra*. Thus, here the issue of whether a private plaintiff may sue for injunctive relief under RICO is complicated by the threshold issue of Petitioners' lack of "business or property" injury. In short,

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ciated with smoking are a matter of longstanding common knowledge. *See, e.g., Roysdon* v. *R.J. Reynolds Tobacco Co.*, 849 F.2d 230, 236 (6th Cir. 1988); *Allgood* v. *R.J. Reynolds Tobacco Co.*, 80 F.3d 168, 172 (5th Cir. 1996).

even were there a fully developed circuit split concerning the availability of RICO injunctive relief in a suit by a private plaintiff — and there is not (see below) — these cases are not appropriate vehicles by means of which to address the issue.

*Second*, there is no circuit split warranting review. The Ninth Circuit rejected the funds' claim for RICO injunctive relief on the basis of its decision in *Religious Technology Ctr.* v. *Wollersheim*, 796 F.2d 1076 (9th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987). *See Oregon Laborers*, 185 F.3d at 967-68 (OL Pet. 19a). *Wollersheim* extensively reviewed the legislative history of 18 U.S.C. §1964 and concluded that injunctive relief under RICO is not available to private litigants. 796 F.2d at 1084-87. A number of Courts of Appeals are in agreement with the Ninth Circuit's conclusion. *See, e.g., In re Fredeman Litig.*, 843 F.2d 821, 828-30 (5th Cir. 1988); *Dan River, Inc.* v. *Icahn*, 701 F.2d 278, 290 (4th Cir. 1983); *Trane Co.* v. *O'Connor Securities*, 718 F.2d 26, 28-9 (2d Cir. 1983); *see also Kaushal* v. *State Bank of India*, 556 F.Supp. 576, 581-85 (N.D.Ill. 1983). Certain Courts of Appeals have not expressed a view on the issue. The *only* example Petitioners can offer of a Court of Appeals indicating that injunctive relief *is* available to a private RICO plaintiff is a one sentence footnote in *Faircloth* v. *Finesod*, 938 F.2d 513, 518 n.11 (4th Cir. 1991) (OL Pet. 26 n.10). In that footnote, a panel of the Fourth Circuit — without discussion and citing no authority (in particular, not citing *Dan River* (*op. cit.*), an earlier Fourth Circuit case expressing "substantial doubt" that such relief was available) — affirmed a permanent injunction issued incident to an award of treble damages to prevent defendant from collecting on a note wrongly obtained from plaintiff. *See* OL Pet. 26 n.10. This solitary footnote does not establish a circuit split warranting *certiorari*.*

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* The Third Circuit in *Steamfitters* states that "circuits are split" on the issue of injunctive relief for private RICO plaintiffs, and cites *Conkling* v. *Turner*, 18 F.3d 1285, 1296 n.8 (5th Cir. 1994), for that statement. 171 F.3d at 935 n.20 (Stm. Pet. 39a). But the only Court of Appeals case *Conkling* cites as favoring the availability of such relief is *Bennett*

*Third,* unless the Court first overrules *Wollersheim* and other Courts of Appeals and holds that RICO injunctive relief *is* available to a private plaintiff, it would obviously be futile for the Court to address the issue raised by the *Laborers Local* Petitioners of whether the *Holmes* policy considerations apply in such a suit for injunctive relief. In addition, Petitioners are asking this Court to decide the applicability of the *Holmes* considerations in a private RICO injunction suit on an entirely clean slate: Petitioners do not identify any court in the country that has addressed this issue (*all* the cases Petitioners cite on this point concern injunctive relief under the antitrust laws, *see* LL Pet. 27-30).

## CONCLUSION

For the foregoing reasons, the petitions for writs of *certiorari* in *Laborers Local*, *Steamfitters* and *Oregon Laborers* should be denied.

Dated: November 23, 1999

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v. *Berg*, 685 F.2d 1053, 1064 (8th Cir. 1982); however, *Bennett* merely cites to a law review article "without at this time endorsing or rejecting the opinions there expressed." Moreover, the argument of the article cited by the Eighth Circuit in *Bennett* — an argument relied on by the *Oregon Laborers* Petitioners (*see* OL Pet. 27) — has been criticized by a number of courts. *See, e.g., Sedima* v. *Imrex Co.*, 741 F.2d 482, 490 n.20 (2d Cir. 1984) ("a rather remarkable argument"), *rev'd on other grounds*, 473 U.S. 479 (1985); *Kaushal*, 556 F.Supp. at 582 & n.17 ("bizarre and wholly unconvincing" argument ).

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## Appendix

# FEDERAL COURT OPINIONS IN SUITS BROUGHT BY UNION FUNDS AND OTHER PRIVATE PAYORS ASSERTING RICO AND/OR FEDERAL ANTITRUST CLAIMS

## A. FEDERAL COURTS DISMISSING RICO AND/OR FEDERAL ANTITRUST CLAIMS

### 1. Courts of Appeals

***Second Circuit:***

*Laborers Local 17 Health & Benefit Fund* v. *Philip Morris, Inc.*, 191 F.3d 229 (2d Cir. 1999) (on § 1292(b) appeal by defendants, reversed denial of 12(b)(6) motion and directed dismissal of RICO claims; federal antitrust claims previously dismissed by district court, 7 F.Supp.2d 277 (S.D.N.Y. 1998)), *r'hg and r'hg en banc denied* (2d Cir. Aug. 6, 1999).

***Third Circuit:***

*Steamfitters Local Union No. 420 Welfare Fund* v. *Philip Morris, Inc.*, 171 F.3d 912 (3d Cir. 1999) (affirmed dismissal of RICO and federal antitrust claims), *r'hg and r'hg en banc denied* (Apr. 29, 1999).

***Seventh Circuit:***

*International Brotherhood of Teamsters, Local 734 Health & Welfare Trust Fund and Central States Joint Board Health & Welfare Trust Fund* v. *Philip Morris, Inc.*, and *Arkansas Blue Cross & Blue Shield* v. *Philip Morris Inc.*, 1999 WL 1034711 (7th Cir. Nov. 15, 1999) (suits by union funds and Blue Cross/Blue Shield enti-

ties;* affirmed or directed dismissal of all claims, including RICO and federal antitrust claims).

***Ninth Circuit:***

*Oregon Laborers–Employers Health & Welfare Trust Fund* v. *Philip Morris, Inc.*, 185 F.3d 957 (9th Cir. 1999) (affirmed dismissal of RICO and federal antitrust claims).

**2. District Courts**

*Allegheny General Hosp.* v. *Philip Morris, Inc.*, No. 99-9, slip op. (W.D. Pa. Nov. 4, 1999) (Judge Ambrose) (RICO and federal antitrust claims by hospital owners and operators dismissed).

*Arkansas Carpenters' Health & Welfare Fund* v. *Philip Morris, Inc.*, No. LR-C-97-754, slip op. (E.D. Ark. Sept. 28, 1999) (Judge Moody) (RICO and federal antitrust claims dismissed); notice of appeal filed; appeal voluntarily dismissed (8th Cir. Nov. 22, 1999).

*Rhode Island Laborers' Health & Welfare Fund* v. *Philip Morris, Inc.*, 1999 WL 619064 (D.R.I. Aug. 11, 1999) (Magistrate Judge Lovegreen) (recommending dismissal of RICO and federal antitrust claims; recommendation pending with district court).

*Massachusetts Laborers' Health & Welfare Fund* v. *Philip Morris, Inc.*, 62 F.Supp.2d 236 (D. Mass. 1999) (Judge O'Toole) (RICO and federal antitrust claims dismissed).

*Lyons* v. *Philip Morris, Inc.*, No. 98-515, slip op. (D. Minn. Apr. 29, 1999) (Judge Magnuson) (RICO and federal antitrust claims dismissed); appeal pending.

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* Except where specifically indicated, plaintiffs in the cases listed herein were union funds.

*Contractors, Laborers, Teamsters & Engineers Health & Welfare Plan* v. *Philip Morris, Inc.*, No. 8:98CV364, slip op. (D. Neb. Feb. 18, 1999) (Judge Shanahan) (RICO and federal antitrust claims dismissed).

*Laborers' & Operating Engineers' Utility Agreement Health & Welfare Trust Fund for Arizona* v. *Philip Morris, Inc.*, No. CIV 97-1406 PHX SMM (D. Ariz. Feb. 10, 1999) (Judge Sedwick) (RICO and federal antitrust claims dismissed); appeal pending.

*Hawaii Health & Welfare Trust Fund for Operating Engineers* v. *Philip Morris, Inc.*, 52 F.Supp.2d 1196 (D. Haw. 1999) (Judge King) (RICO and federal antitrust claims dismissed); appeal pending.

*Regence Blueshield* v. *Philip Morris, Inc.*, 40 F.Supp.2d 1179 (W.D. Wash. 1999) (Judge Rothstein) (RICO and federal antitrust claims brought by various Blue Cross/Blue Shield entities dismissed); appeal pending.

*Oregon Laborers-Employers Health & Welfare Trust Fund* v. *Philip Morris, Inc.*, 17 F.Supp.2d 1170 (D.Or. 1998), *aff'd*, 185 F.3d 957 (9th Cir. 1999) (*see* RA2, *supra*).

*Williams & Drake Co.* v. *American Tobacco Co.*, No. 98-553, slip op. (W.D. Pa. Dec. 21, 1998) (Judge Ambrose) (RICO and federal antitrust claims brought by self-insured employer dismissed).

*Texas Carpenters Health Benefit Fund* v. *Philip Morris, Inc.*, 21 F.Supp.2d 664 (E.D. Tex. 1998) (Judge Heartfield) (RICO and federal antitrust claims dismissed); appeal pending.

*Iron Workers Local Union No. 17 Insurance Fund* v. *Philip Morris, Inc.*, 23 F.Supp.2d 771 (N.D. Ohio 1998) (Judge Gwin) (denying defendants' motion to dismiss); 29 F.Supp.2d 801 (1998) (summary judgment granted dismissing federal antitrust claims); bench order (Mar. 5,

1999) (directed verdict dismissing RICO claims); jury verdict for defendants (Mar. 22, 1999), finding no fraud.

*Seafarers Welfare Plan* v. *Philip Morris, Inc.*, 27 F.Supp.2d 623 (D. Md. 1998) (Judge Garbis) (RICO and federal antitrust claims dismissed); notice of appeal filed; appeal voluntarily dismissed (4th Cir. Sept. 14, 1998).

*New Jersey Carpenters Health Fund* v. *Philip Morris, Inc.*, 17 F.Supp.2d 324 (D.N.J. 1998) (Judge Barry) (federal antitrust claims dismissed); slip op. (May 11, 1999) (dismissing RICO claims).

*Stationary Engineers Local 39 Health & Welfare Trust Fund* v. *Philip Morris, Inc.*, 1998 WL 476265 (N.D. Cal. Apr. 30, 1998) (Judge Jensen) (RICO and federal antitrust claims dismissed); appeal pending.

*Steamfitters Local Union No. 420 Welfare Fund* v. *Philip Morris, Inc.*, 1998 WL 212846 (E.D. Pa. Apr. 22, 1998), *aff'd*, 171 F.3d 912 (3d Cir. 1999) (*see* RA1, *supra*).

*Southeast Florida Laborers District Health & Welfare Trust Fund* v. *Philip Morris, Inc.*, 1998 WL 186878 (S.D. Fla. Apr. 13, 1998) (Judge Ryskamp) (RICO and federal antitrust claims dismissed); notice of appeal filed; appeal voluntarily dismissed (11th Cir. Oct. 20, 1998).

## B. VOLUNTARY DISMISSALS OF RICO AND FEDERAL ANTITRUST CLAIMS BY PLAINTIFFS

*Northwest Laborers-Employers Health & Security Trust Fund* v. *Philip Morris, Inc.*, No. C97-849WD, slip op. (W.D. Wash. Dec. 23, 1998) (Judge Dwyer) (denying motion to dismiss); RICO and federal antitrust claims voluntarily dismissed (May 25, 1999); 58 F.Supp.2d 1211 (1999) (granting summary judgment dismissing remaining claims); appeal pending.

*West Virginia Laborers' Pension Trust Fund* v. *Philip Morris, Inc.*, 1998 WL 964983 (S.D. W. Va. 1998) (Judge Haden) (denying motion to dismiss); RICO and federal antitrust claims voluntarily dismissed (June 28, 1999).

*Kentucky Laborers District Council Health & Welfare Trust Fund* v. *Hill & Knowlton, Inc.*, 24 F.Supp.2d 755 (W.D. Ky. 1998) (Judge Heyburn) (denying motion to dismiss some RICO claims, but dismissing other RICO claims and federal antitrust claims); remaining RICO claims voluntarily dismissed (Oct. 5, 1999).

*B.A.C Local No. 32 Insurance Trust Fund* v. *Philip Morris, Inc.*, No. 97-75675 (E.D. Mich.) (Judge Duggan); RICO and federal antitrust claims voluntarily dismissed (Sept. 18, 1998).

## C. COURTS CERTIFYING FOR § 1292(b) APPEAL

*Utah Laborers' Health & Welfare Trust Fund* v. *Philip Morris, Inc.*, No. 2:96CV 829B, slip op. (D. Utah Mar. 30, 1999) (Judge Benson) (denying motion to dismiss RICO and federal antitrust claims); slip op. (Sept. 3, 1999) (granting motion for § 1292(b) certification); leave to appeal granted (10th Cir. Nov. 22, 1999).

## D. COURTS WHICH HAVE NOT DISMISSED RICO AND FEDERAL ANTITRUST CLAIMS OR CERTIFIED PURSUANT TO § 1292(b)

Eastern District of New York (Judge Weinstein) in two cases: (1) *National Asbestos Workers Medical Fund* v. *Philip Morris, Inc.*, 23 F.Supp.2d 321 (E.D.N.Y. 1998) (denying motion to dismiss RICO claims); and (2) *Blue Cross and Blue Shield of New Jersey* v. *Philip Morris, Inc.*, 36 F.Supp.2d 560 (E.D.N.Y. 1999) (denying motion to dismiss in case brought by various Blue Cross/Blue Shield entities). The following orders and decisions were captioned jointly in both cases: 1999 WL 592669 (Aug. 2, 1999) and 1999 WL 706113 (Sept. 7, 1999) (denying motions for summary judgment and to dismiss fourth amended complaint); slip op. (Oct. 13, 1999) and 1999 WL 1000144 (Nov. 1, 1999) (denying § 1292(b) certification); *In re Philip Morris, Inc.*, No. 99-3058, order (2d Cir. Oct. 26, 1999) (denying petition for mandamus); petition for rehearing *en banc* filed Nov. 8, 1999.